UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY	:	
	:	
vs.	:	Case Number:
	:	AU:23-CV-00129-DAE
LILLIAN MILLS, ETHAN BURRIS and SHERIDAN TITMAN,	:	Austin, Texas
Defendants.	:	April 5, 2023

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:
FOR THE PLAINTIFF:
Endel Kolde, Esquire
Stephanie M. Brown, Esquire
Institute for Free Speech
1150 Connecticut Avenue, NW, Suite 801
Washington, D.C. 20036
(202)301-1664; dkolde@ifs.org

Michael E. Lovins, Esquire
Lovins Troslcair, PLLC
12700 Park Central Drive, Suite 520
Dallas, Texas 75251

FOR THE DEFENDANTS:
Joel R. Glover, Esquire
Matt Dow, Esquire
Jackson Walker, LLP
1401 McKinney, Suite 1900
Houston, Texas 77010
(713)752-4226; jglover@jw.com

COURT RECORDER: FTR GOLD
TRANSCRIBER:
Angela M. Hailey, CSR, CRR, RPR, RMR
Official Court Reporter, U.S.D.C.
262 West Nueva Street
San Antonio, Texas 78207
Phone(210)244-5048;angela_hailey@txwd.uscourts.gov

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(April 5, 2023, 11:02 a.m.)

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COURT SECURITY OFFICER: All rise.

THE COURT: Thank you. Y'all can have a seat.

COURTROOM DEPUTY CLERK: The Court calls the following case for a motion hearing. 1:23-CV-00129-DAE, Lowery versus Mills, et al.

THE COURT: Good morning. Just a second here to get electronically situated. Why don't we start by having counsel for plaintiff and defendants state their names on the record and who they represent.

MR. KOLDE: Good morning, Your Honor. Endel Kolde for plaintiff, Richard Lowery. Mr. Lowery is here present in the courtroom. If you could stand up, Richard, please?

THE COURT: Good morning.

MS. BROWN: Good morning, Your Honor. Stephanie Brown, counsel for Richard Lowery.

THE COURT: Good morning.

MR. LOVINS: Good morning, Your Honor. Michael Lovins, also counsel for Mr. Lowery.

THE COURT: Good morning.

MR. GLOVER: Good morning, Your Honor. Joel Glover of Jackson Walker, counsel for defendants, Dean Mills, Dean Burris and Professor Titman. We have in-house counsel with us, Joe D. Biggs from the University -- excuse me, Adam Biggs from the

University, and Joe D. Hughes also from the University. But here making the trains run is Tim Herndon, he's our litigation support specialist.

MR. DOW: Your Honor, Matt Dow for the defendants.

THE COURT: Good morning to all of you. Welcome. I think we initially set this for one hour and I don't know that we'll need much more time than that. I did get a chance to glance through your posed decs. So on the defendant side looks like there's 25 slides, but I imagine those will go pretty quickly.

I want to kind of share some introductory remarks and impressions with y'all and then I'll turn it over to the plaintiffs to lead us off and hear argument from counsel for the defense. I'll have questions along the way, but I want to start by framing this, I guess, or confirming what is the limited scope of this particular hearing and my task here which is to decide what, if any, discovery is necessary to give the plaintiff an opportunity to make his case for a preliminary injunction. That's not the same as the overall -- the question of what might ultimately be resolved in the merits in this case or the scope of discovery should this case continue forward past the motion to dismiss. It really is a question of what is the standard that the plaintiff has to establish at preliminary injunction. And again, what, if any, more is needed to afford plaintiff an opportunity to meet that standard.

In terms of timing, I don't see on the docket that Judge Ezra has set a hearing yet for the preliminary injunction and I don't know whether Judge Ezra intends to decide the motion to dismiss before setting the preliminary injunction hearing or which is going to come first or when either of those things will take place. That doesn't prevent me from making a decision in this case and setting a timeline that I think is appropriate, but I just flag that that there are some unknowns that has some bearing on the procedural posture of this case and the preliminary injunction issue.

Going back to the framing issue, frankly, I see the requests as they currently are, the document requests and the depositions to encompass a large sloth of what seems to be -- what would ultimately be sought in full blown merits discovery. So I can tell you my impression, and I'm open to being convinced otherwise, is that the requests as they currently stand are overbroad. A question arose in my mind and it seemed to be sort of hinted at in the briefing about whether if the parties just had their 26(f) conference if we could just move into merits discovery. But I'm aware of the fact and I anticipate that defendants might resist any merits discovery pending a resolution of the motion to dismiss and so maybe that doesn't solve the problem, but I am interested in knowing where y'all stand with respect to a 26(f) conference if that's happened at all. I know in the plaintiff's briefing you

mentioned that you had made some overtures about having that, but it hadn't taken place as of when your reply was filed.

I can also tell you that as I sit here now I'm not convinced that any discovery is necessary from nonparties, that there might be some -- I'm potentially open to limited discovery from the three named defendants at this point, but again, I've not made up my mind and the order is not written and I'm here to hear your argument. That's kind of where my head is at right now. It's my custom to share my initial impressions with counsel up front so you're not trying to guess where my head is at coming into it. I try not to prejudge things, but I do want you to know what my thinking is so you can tailor your arguments to it. With that said, that's kind of all of the -- and I will have questions as you go through, so just expect to be interrupted. That's just how it's going to go.

That's all of my initial impressions that I had that I wanted to share with y'all up front, so we'll start with Mr Kolde.

MR. KOLDE: Thank you, Your Honor. I'm going to move back and forth if that's all right.

THE COURT: That's perfectly fine.

MR. KOLDE: May it please the Court, as the Court noted, this is a discovery motion. We're not here to argue the motion on the merits, but I do want to talk about one of our

central theories in the case in order to set the table and help the Court understand why we need expedited discovery and what we've asked for. We're making two claims, a chilled speech claim and a retaliation claim. They are both directed at counter and current ongoing harm, self-censorship.

One of our theories of the case, the one that matters here today is that UT President, Jay Hartzell got upset when Richard Lowery repeatedly publicly criticized him. That criticism took various forms, some variation of the following. He promoted -- he is a promotor of DEI ideology, which is a hotbed issue in Texas politics right now, frankly, in national politics, that Jay Hartzell allowed and organized the highjacking of the Liberty Institute Initiative at the University of Texas Austin, and that he essentially acts as a buffer or frontman for the mostly leftwing faculty at UT Austin and sort of as a go-between for the Republican office holders who are responsible for deciding on the funding for UT Austin. He stated that publicly in various articles, other online forums including a podcast.

One of our key theories, not the only theory, but one of our key theories is that Hartzell got frustrated and asked his subordinates to silence Richard Lowery. They picked a pressure point that didn't enjoy tenure protection, his affiliation with the Salem Institute, and they threatened that. And I want to be clear, he did get renewed this year, but the

threat was delivered, in essence, this way. We're going to renew you this year, but might not renew you in the future. And it was delivered via Carlos Carvalho, that was sort of the main point of contact of the defendants to the plaintiff and the plaintiff's allies.

There's a whole bunch of evidence that's been entered into this case, I'm not going to discuss all of it. I would like to discuss a few curated pieces. I'll start by reviewing two exhibits that illustrate the criticism of Hartzell and then I'll be reviewing a very short timeline that illustrates the timing because, as the Court knows, in censorship and retaliation cases, timing matters, temporal proximity matters. So this first document that we're looking at here is ECF 8-9, it's a Martin Center article that was published and is publicly available. It was published July 1st. It's about this highjacking of the Liberty Institute and I'm not going to go through the article in detail except that it's published by Richard Lowery, it refers to UT Austin administrators and throughout the article he is mentioning Richard Hartzell by name and -- excuse me, Jay Hartzell by name, and referring to the UT President essentially highjacking the process by assigning his deputy, Richard Flores, who is a who is a CRT adherent, according to Professor Lowery to essentially orchestrate and manage the process.

THE COURT: What is CRT?

MR. KOLDE: Critical race theory, Your Honor, which is one of the issues in this case. It's also working its way through the Texas legislature right now, at least one proposal that focus on essentially banning or at least dealing with the issue of CRT in public universities. So I won't go into this in detail that some of the criticism of Jay Hartzell is laid out in this July 1st article.

Then later in July, Professor Lowery appeared on the Richard Hanania podcast, the CSPI, Center for Partisanship in Politics, something like that, podcast. It's also publicly available, it's on YouTube, it's available from Apple podcast, various download platforms. And I'm going to play just a short section. This is in the record as ECF 8-10, there's also a transcript that the defendants entered into the record. The timestamp I'm starting it at 23:57, I'm going to run it to about a minute 27.

(Audio recording playing.)

Speaker1: Basically just it's really a advocacy thing and they've got close ties to people in the University administration. I don't know who planted it, but they came out with this big exposé on the Liberty Institute and how all these evil West Texas millionaires were interfering in the sacred trust of the University of Texas and suddenly politics was going to make its way into the University of Texas as if we haven't converted ourselves entirely into a leftwing activist

machine for the past five years. And so then the President -- now, it turns out the President had picked one of his deputies to be sorting out how this stuff was going to work and he picked a critical race theorist. So one of the first things he did was make like hard core critical race theorist who like teaches Marxist stance and doesn't believe there should be a single conservative voice on campus, he made him vice president of academic priorities. Now, this is a guy who's now in charge of figuring out how to set up this new dissenting entity. So we've got a critical race theorist in charge, this article comes out. I don't know if that's a coincidence.

Speaker2: Which came first, the article or the critical race theorist?

Speaker1: It turned out the critical race theorist had been in charge for months that we didn't know about, and then the article comes out, President is like, Oh, no, we can't do what we used to do.

He calls in Carlos for this meeting, and then the critical race theorist is sitting there dictating exactly how the thing will be structured and the idea is, okay, Carlos we'll let you run this as long as you just give money to existing departments to hire people that we'll hire anyway. And you can ask them to hire people, but you can't do anything. So the whole idea of an independent group, you cannot hire a sensible person with the assent of the anthropology or

sociology department, so the idea is like, okay, you've gotten this money for this independent thing, instead we're just going to use it to fund the wish lists of existing departments and you just go around and tell all the conservative donors and politicians that everything is fine and this is the right way to do it.

Now, all of this is the plan of a critical race theorist who has been trusted to bring dissenting non-leftist thoughts. At this point, obviously we're not going to go along with that nonsense, we have better things to do with our time than provide cover for the President to let critical race theorists run the University of Texas. So Carlos tells the supporters, No, this isn't what we agreed to, we're not going to do this.

And that's when the -- with the single exception, the donors turned on us, the President starts doing his like -- the people -- the sole qualification for being a President of a university in a red state is that you're good at lying to Republicans. So he manages to get the donors convinced that we are the problem, Oh, we won't play along with the critical race theorist plan so we're putting the thing in danger. The thing is dead.

(Audio recording stopped.)

* * *

MR. KOLDE: I stopped there and at 27, Your Honor, and

I'm just going to pull up my timeline here real quick. All right. So this is our abbreviated timeline. This is a shorter version of what's in the defendant's Power Point. I think it illustrates sort of the connection of these events. There are other criticisms, there are other events that matter in this case, but these are some of the key points.

In July, Richard publishes this story, this article, opinion piece, it's publicly available. On the 18th he goes on the Hanania podcast. Sometime in late July, early August, Titman calls Carvalho, it's the We need to do something about Richard conversation. In that conversation, according to Professor Carvalho, Titman says that Hartzell and Mills are upset about Richard Lowery's political advocacy. That is in ECF 8-2, which is the Carvalho declaration. That then leads to a meeting on August 12th between Mills and Burris and Carvalho.

That meeting is described differently in the Carvalho declaration than it is in the Mills and Burris declarations. They agree on a few things. They do agree that there was some discussion of Lowery's speech. Mills characterizes it as disruptive. I believe that Burris called it disparaging or something like that, so it's clear they had a discussion about Lowery's speech and they characterized it in a negative way. They deny or don't remember saying various other things that Carvalho said they said in the meeting, like Richard's speech was crossing the line, that Carvalho essentially needed to

intervene and do something to reign Richard in and, very importantly, that potentially Richard's affiliation with the Salem Center was at risk of not being renewed as well as Carlos Carvalho's own affiliation as a director of the Salem Center. Those facts are disputed and that testimony is disputed and I'm going to come back to this in a moment. That's very important, that August 12th meeting is very important.

THE COURT: I've got some questions for you.

MR. KOLDE: Yes.

THE COURT: First of all, I understand that a fair amount of your argument in your motion for discovery to be -- you know, when you point to this discovery or that, whether it's the documents or depositions, that these matters might clear up some disputed fact issues particularly where people's versions of the stories or their recollections of these conversations differ. In terms of your entitlement to a preliminary injunction, what's the standard in terms of satisfying the likelihood of success on the merits prong? It can't be that you've got to prove that you are going to win your case, right? I mean, once you're at the stage that you've got disputed facts, haven't you at least satisfied that preliminary prong? I mean, because if you're right that, gosh, we need to get into extensive discovery or even, you know, what you might characterize as targeted discovery on -- to satisfy our burden on likelihood of success on the merits, then it

seems like that would apply in every case in which a preliminary injunction is sought, but the norm is that there's not discovery before a PI.

So it seems to me that your argument that there are disputed facts supports that you are in good shape on your likelihood of success on the merits, right?

MR. KOLDE: I like what you're saying, Your Honor, and I wish that you in deciding this issue on the merits, I hope that Judge Ezra would take the same position, but I would like corroboration for the disputed facts on the merits. Just to state it quite simply and succinctly, part of our claim, particularly the censorship, self-censorship claim, the chilled speech claim depends on whether or not Mr. Lowery, Professor Lowery is reasonably self-censoring based on a threat to his career for his Salem Center affiliation. That threat was largely delivered in this conversation here on August 12th. There are bits and pieces that came out in other conversations, but this conversation is where that threat was delivered. They're denying it and so they're disputing delivering that threat. Carlos Carvalho is saying the threat occurred. When facts are in dispute at the preliminary injunction stage, District Courts are directed to have an evidentiary hearing, Kaepa v. Achilles Court 76 F 3rd 624, 628.

THE COURT: Well, that's another thought that came to mind is I imagined, yes, that there might indeed be an

evidentiary hearing, and so if you're going to have Burris and Carvalho and Titman and these people on the stand in a hearing, why do you also need a deposition, a three-hour deposition?

MR. KOLDE: Well, I could probably do it in less, Your Honor, but I don't know -- I've had people run the clock out on me before when I've had limited deposition do various things to -- when I've had expedited discovery in similar cases, to not allow me to get the questions in. I understand that at least in this District there are only objections to form allowed, so there hopefully would not be any long-winded speaking objections. Can I do the deps in two hours, 90 minutes, maybe even 60 minutes? Probably. The part of it is also not wasting the Court's time. If I never talk to these witnesses and potentially even for the other side with regard to Lowery and Carvalho, we're going to be less efficient presenting the case to the Court.

THE COURT: What if then instead of live depositions, you were given an opportunity to pose a set of, let's say, of half a dozen or eight or ten deposition or written question typo written requests. They at least give you a preview of what to expect and how to shape your questioning once you have them on the stand.

MR. KOLDE: I proposed that once when I was on the defense side, but you know, that was vigorously opposed by the other side and the judge didn't order it and I was representing

an Apex witness. I think the problem with that is, Your Honor, it's just like interrogatory answers, I think they're -- they have some value in the discovery process, but we all know that they're heavily lawyered. They are going to not tell us a lot of information. And what makes depositions the gold standard and the most effective work hunting down information like this is the ability to ask necessary follow-up questions and to probe the witness and to test their credibility. Even if it's just for an hour long deposition.

THE COURT: So as I consider whether or not any discovery is necessary here, I'm trying to use as my guiding just practical principle here of what do you need at that hearing. Right? And one of the framing aspects of the preliminary injunction hearing is the terms of the preliminary injunction itself that you're seeking? And I read the motion and the motion asks for a preliminary injunction to be granted, but what are the exact terms of the preliminary injunction? I didn't see a proposed order in there. How would your -- if you were Judge Ezra and you presided over the evidentiary hearing and concluded, yes -- and it could be that I overlooked the docket, forgive me if I did, but what would be the terms of your preliminary injunction?

MR. KOLDE: Well, in terms of what we've asked for, I believe there wasn't a proposed order required at the time we filed the MPI that in our prayer for relief in docket entry

one, ECF 1, the Complaint, pages 24 and 25, we've asked for an order preliminarily and permanently enjoining defendants, their officers, agents, servants, employees and all persons in active concert or participation with them who receive actual notice of the injunction from threatening Lowery for protected speech or from implementing those threats, including reducing his pay removing his job responsibilities, removing his affiliation with the Salem Center, reducing his access to research opportunities, reducing his academic freedom, labeling his criticism as violent or uncivil, asking any police agency to surveil Lowery's speech, and engage in any other adverse employment action or employment action designed to dissuade a reasonable person in Lowery's position from engaging in protected speech.

The defendants pushed back on some of the parameters of that and, of course, they could work out some of the details and titrate that further. That's where our request is. We're essentially -- he is self-censoring today because of the message that was delivered to him via Burris and Mills, and he doesn't want to take a chance that he's going to lose the Salem Center affiliation which is renewable annually and discretionary, he feels he would lose $20,000 of pay, also the prestige and access to research opportunities as a result of that.

As the Court has seen, he's obviously an opinionated

person. He's a dissenting voice within the UT and academic community, but that voice has been silenced because, like many people who have mortgage to pay and family to support, he's not willing to run the risk of having his speech offend people. It is possible that Mills and Burris and Titman are acting for their own regard, I guess, what they suppose might be Jay Hartzell's feelings, but it is also very plausible and we would argue credible that the message came from the top, from Jay Hartzell that he was upset by the criticism and the fact that -- he was upset by the fact that Richard Lowery was reaching some people in elected positions in Texas government, some of whom have reacted by introducing bills that go to some of the issues that Richard Lowery has talked about and that are legislative priorities in the Texas legislature. And silencing has been effective, lowery has been silenced. So this is how it's done.

Jay Hartzell has the motive. That August 12th meeting was the opportunity to censor and retaliate against Richard Lowery.

THE COURT: Are defendants correct that the main issues at the PI hearing will be your client's subjective fear of having his speech chilled and the objective reasonableness of that fear?

MR. KOLDE: I think it's one important issue, yes.

THE COURT: Setting aside the fact disputes about who

said what when, what are the other matters that the Court is going to have to decide in order to conclude that you're entitled to a preliminary injunction?

MR. KOLDE: Our position, Your Honor, is that the Court will have to make some judgment what message was delivered by Mills and Burris at that August 12th meeting.

THE COURT: So I find myself -- in looking at this, so the last date on your timeline there is August 24, 2022. Today is April 5th, 2023. So however many days that is, 18 months, roughly year and a half since the last -- more than 18 months -- I'm sorry, it's less than a year, but still several months since this happened. At most, you're going to get a forward-looking injunction.

MR. KOLDE: Of course, always.

THE COURT: The Court is not going to have jurisdiction to do anything more than that at a preliminary injunction hearing anyway. Right? So you've got exhibits and you've got declarations for both sides, you're going to have live testimony at a hearing.

MR. KOLDE: I don't know that, Your Honor.

THE COURT: Well, maybe you do, maybe you don't, but I'm still at a loss on if what you're seeking is a forward looking injunction, what difference does it make about all these conversations that happened eight months ago when the question is really if you want an injunction that says,

University, stop chilling speech, that's a looking forward thing.

MR. KOLDE: Of course, but it matters when and how the threat was delivered. Yes, there was some delay in coming into court, that's the nature of obtaining counsel. We are a public interest law firm. We are doing this case on a pro bono basis. There is not a lot of availability for people who do pro bono civil rights litigation and we don't have enough lawyers to handle all the cases that we have. So that is part of the reason why this case was not filed in the winter or in the fall of last year, but we are talking about not that long of a timeline, and the harm is ongoing.

Just recently Richard Lowery was asked to cosign an editorial in the Wall Street Journal, he was also contacted about the possibility of testifying about some of the issues that he's been self-censoring before the Texas legislature. He declined both of those opportunities, so that harm of self-censorship is ongoing and it's recent. Again, it is about delivering the threat and the message.

We are not asking for damages here. I understand counsel for the defense has made an argument that we're trying to seek retrospective relief -- *(inaudible)* -- we're not doing. But what happened in the past is relevant, the past is prolonged. It's relevant to the future, it's relevant with regard to how they delivered the threat and why he's

self-censoring today.

Same thing, by the way, on the Verizon case on standing where the Supreme Court acknowledged that it was acceptable to look for -- or for Verizon to talk about past action, regulatory action that had been taken because it was relevant to the issue of forward looking -- of regulatory action.

THE COURT: With respect to the Apex deposition argument that was made, I saw in your reply you cited a couple cases addressing the propriety of deposing people at the top of an organizational structure. I'm curious, were those cases -- did those involve -- was that merits discovery or was that a pre-preliminary injunction expedited discovery that was ordered from an Apex witness?

MR. KOLDE: I would have to double-check on that, Your Honor, and I can do that while the other counsel is arguing. But what I took away from those cases, the two cases that was cited, one was when there is a theory of the case that posits direct involvement by the Apex witness, getting a deposition of the Apex witness is appropriate. And the second case that we cited had to do with the inadequacy of having a 30(b)(6) witness essentially interpose themselves when the credibility of the Apex witness or the top executive was at issue. And here it is about Jay Hartzell's credibility and his involvement, because if he put an order out or a directive or a

suggestion or expressed a concern to his underlings in what is essentially a corporate structure, that's the law at the University today, that makes it much more likely and credible that Carlos Carvalho's version of events of the August 12th meeting is more accurate and more credible than Mills and Burris's.

THE COURT: Well, I got a question about the document request you have because I had about 25 of your 30 minutes at this point and I do want to address this. The document -- one of the things the defendants complained about is that it's vague or overbroad because it says, referring to Lowery's speech, directly or indirectly. And I can see how the "or indirectly" sure seems to open up the scope of that document request significantly. What if that document request was limited -- take out "or indirectly" all together and maybe just search custodians who are parties to the case who -- and maybe even further limit it to certain key words like Lowery, Carvalho or Salem Center.

MR. KOLDE: That would be a start, Your Honor. I'm concerned that they might have used code words or different words to address those issues. I used to be a defense attorney for a large government entity. These e-mail searches, they're on Office 365 and they have Microsoft advanced E-discovery tool, they could hire a competent person to do these searches in about an hour, it wouldn't be very hard. But part of what

we have here is also a history of Jay Hartzell texting people who he used to work with in the business school. And the text, as is true in many organizations, they're not part of the official record, they're not backed up onto UT's exchange servers, those need to be gathered via custodial interviews. That's not super hard, but it requires reaching out to each of those six people individually, talking with them about whether they sent texts related to Richard Lowery. They might use the word "Richard." They might use the word "Lowery" or they might not. They just might refer to this problem that we're having or something like that, and those would not be normally gathered by downloading them. I'm okay with screen shots as long as people haven't been deleting them, that a false pretentious setting on iPhones for iMessages is forever. So unless they've been changed to one year or 30 days, which is possible and there are some interesting cases about that, you know, those texts for a meeting that happened less than a year ago would still potentially be around.

We would at least want the questions to be asked and an attempt made to gather that information. A lot of the conversations that used to happen by e-mail that were sort of unvarnished, unfiltered, now take place by text message. And organizations are not always very good about gathering those text messages. We want the question to be asked and we want to know if there were text messages sent to or from those six

people which is a very small finite group of key players for a very tight five-month period. Talking to them, gathering the screen shots is not a terribly involved process and this is a very capable law firm here on my right. They have the people that can do that and help UT deal with those issues. Internally gathering e-mails should be fairly easy.

I agree the search terms that are proposed by the Court would be a good place to start, but I would ask that an interview be had with the key witnesses that say, Well, did you send e-mails about Lowery's speech that might have used other terms or that might have referred to it in a different way?

I've been involved with the Sadona Conference for many years, I've drank the Kool-Aid, I believe in cooperating with discovery, but the defendants have the most information. This is asymmetric here, we're asking for information that they have. And I really want to emphasize this both as to the documents we've requested, Your Honor, as I close out, and the depositions. Part of what I'd ask the Court to look at is what they have not told us about because that speaks volumes. There is no declaration here from Jay Hartzell. Look at these brilliant, capable lawyers over here, how many resources UT has thrown at this case to prevent discovery. If Jay Hartzell truly was not involved at all, they could have dealt with this issue with a half-page declaration, saying, *I've never talked to any of these people about any of this stuff.* There is no

such declaration. Nor do Mills, Burris or Titman say anything about Jay Hartzell in their declarations. That is what's so telling here. That tells me that UT is hiding something. I don't want to waste the Court's time with a -- I could do this all day, I could be at an MPI hearing all day, but I assume Judge Ezra has got a lot of other things to do. If we're allowed short depositions, even if they're not full three hours, maybe an hour and 90 minutes apiece, we're going to know a lot more information, we're going to be able to decide which witnesses should be called, not called, maybe some witnesses we could just present the deposition excerpts without taking up the Court's time. It would be a much more efficient process and it will also be a much more fulsome record if either side ends up appealing this case.

This is not like Speech First, where the policy at issue and a lot of the allegations were all reduced to paper. There is a factual dispute and we will be asking the Court to make a credibility call. I imagine the defense will also be asking the Court to make a credibility call at the MPI hearing, including in particular what happened at that August 12th hearing. That credibility call requires testimony from the witnesses, that can be live testimony and it could be depositions or it could be a combination of the two. It would be the most efficient and the best process if we're allowed to do both. I am cognizant of the need to save time and costs and

I'm willing to shorten the request for depositions if the Court will give us a chance to take these deps. I really do think --

THE COURT: Mr. Kolde, you're out of time, you're repeating yourself, message received.

MR. KOLDE: Thank you, Your Honor.

THE COURT: Mr. Glover.

MR. GLOVER: Thank you, Your Honor. I'm going to stay here at the podium if that's okay with the Court.

THE COURT: That's perfectly fine.

MR. GLOVER: May it please the Court, Your Honor, this motion for expedited discovery we view should be denied for two reasons. The first being that we have a fully developed preliminary injunction record and anything beyond plaintiff's perceptions, which we'll show you in a moment, Your Honor, are in the record, is irrelevant to determining or determining the outcome of the preliminary injunction motion. And second, that we don't have to get into it too in-depth today, there are some significant jurisdictional issues that are fully briefed in our pending 12(b)(1) motion that we believe should certainly be resolved before any of the type of merits discovery that we just heard about from the other side.

Your Honor, what do we mean when we say that the PI recording fully developed? There are over 500 pages of documents in this record, 29 of those pages comes in the form of testimony from three separate declarations from Professor

Lowery. And that's important for the preliminary injunction, for deciding whether the preliminary injunction should be granted or not because what's relevant in that analysis is Professor Lowery's perceptions, as Mr. Kolde pointed out, around the time that he had those perceptions and around the time that he was deciding whether he should self-chill whether he perceived some sort of adverse employment event. That's what's relevant. And who knows that beyond Professor Lowery himself? And without -- so if anything beyond that such as communications that Professor Lowery wasn't a part of, doesn't even know about yet, testimony about conversations that Professor Lowery didn't know existed or only things might have existed, or didn't for that matter, that would be irrelevant. And if it's irrelevant, then in the preliminary injunction context, there's no purpose for it. And if there's no purpose for additional evidence that would inform the Court in deciding the preliminary injunction motion, then there's no good cause. And when there's no good cause for deciding or for the expedited discovery, then the expedited discovery is improper in the preliminary injunction context.

We'd like to show the Court that we're not just showing that the PI record is fully developed, we'd like to show there's actually a lot that goes into what Professor Lowery was aware of. There are things that he knew, things that he says were said, things that he says he heard about in

addition to actions that he took around this time. We don't dispute what Mr. Kolde said that Professor Lowery published an article in early July. We don't dispute, as Professor Lowery has testified throughout the PI record, that he has a number of articles that he's published leading up to the time at issue here. He did speak at this podcast on July 18th with Richard Hanania. Richard Hanania, I don't know if he got into it, is a visiting scholar at the Salem Center where Professor Lowery is the number two. Professor Carvalho who's another declarant for Professor Lowery heads the Salem Center. In any event, there are a number of these centers at UT and Professor Lowery was a guest on this one podcast.

Tim, if you could please go to slide 20 for me. He said a number of things. We're going to play shorter clips hopefully than what we've seen, but there are some other excerpts. He didn't just say what Mr. Kolde said. He talked generally about UT leadership in July. Go ahead, Tim.

(Audio recording playing.)

Speaker1: ... status quo came down to Republicans voting large amounts of money to people to engage in communist activism and that's just how -- that's just what's okay and now it's worse. Like, I'd go back to communism over let these people --

Speaker2: Good old days of communist --

Speaker1: Back when the KGB was actually carefully

controlling this stuff, it at least had some coherence to it. Now it's all gone so wild without those guys -- those guys got busy with other things and it just kind of had a -- took on a life of its own.

(Audio recording stopped.)

* * *

MR. GLOVER: So he said that he also spoke directly about Dean Mills, a defendant in this case who runs the McCombs School of Business.

THE COURT: But these conversations happened before he started self-censoring, right?

MR. GLOVER: That's right, Your Honor. That's before the alleged self-censorship, but it's important to understand that he's making these statements and not just any sort of statement, but statements that are directly -- that are directed at leadership for the University up to and including President Hartzell where you saw some references on President Hartzell on how the sole qualification is lying to Republican politicians. That's right. But what happens after that? Slide four please, Tim.

So what happens after this, in context, there's a conversation between Professor Titman and Professor Carvalho where Titman allegedly tells Carvalho, quote, *We need to do something about Richard.*

So this is in the context of the first perceived

threat that Professor Lowery has. Now, Professor Titman, as the record shows, disputes exactly how that conversation occurred or what was said, but for purposes of deciding this motion, the motion for expedited discovery, what matters is what Professor Lowery perceived. What Professor Lowery perceived was communicated to him by Professor Carvalho. So this is Professor Carvalho's version of what happened. That's what Professor Lowery perceived.

A couple weeks later, Dean Mills and Dean Burris have a meeting, requested by Professor Carvalho, by the way, they didn't seek him out. And they say -- and Professor's Carvalho's testimony is, quote, *Work with Richard about his speech.*

Again, disputed by the defendants, but it doesn't matter. If this is what Professor Carvalho communicated to Professor Lowery, that's what he knew as of August 12th, August 15th.

Throughout the rest of the month of August, Your Honor, he is tweeting, he tweets the Governor and the Lieutenant Governor asking why the University is becoming communist or full Mao, as a reference to Mao Zedong. A few days later, he tweets about another center within the McCombs School and he says a number of things. He's taking umbrage with what that center is doing. He says, quote, *Even though we invite -- expletive -- communists who support the murder of the*

Romanov children to debate.

It's kind of confusing exactly what that tweet meant, Your Honor, he had to explain it in contemporaneous e-mails that are in the record. He's also had to explain it in his declarations which are also in the PI record, but in any event, that's what he said. That day he alleges and actually the e-mails show that Titman said, quote, *You don't seem to be making friends.*

Well, Professor Lowery has testified in his declaration that that's what he perceived as a threat, so that's already in the record.

The next perceived threat that Professor Lowery had that's in the record, again from Professor Carvalho, is that Dean Burris allegedly tells Professor Carvalho that he has, quote, *The power to have Lowery not attached to the center,* end quotes. That's towards the end of August. But what happens in the next couple weeks? First, he gets a 7,500-dollar merit-based pay raise from the University making his salary over $257,000, I believe. That's in the record. Couple weeks later he is appointed to the Salem Center. Well, what else happens -- excuse me, reappointed to the Salem Center. And for the record, these are all reappointments made on an annual basis for every center, certainly within the McCombs School, but for sure across the entire University system.

September 10th, in between his 7,500-dollar

merit-based pay raise and his reappointment to the Salem Center, Professor Lowery files a lawsuit against Texas A&M in the Southern District, and he says in that lawsuit that he's attempting to apply for a job at Texas A&M to become a professor there, but he can't because he's being discriminated against for a number of reasons, and that's pending somewhere else. But a couple things come out. At that point, the University knows, one, Professor Lowery is trying to apply somewhere else, to another job, and two, that he's an active litigant against another public university in front of a federal judge in this state. So that's going on.

Another perceived threat that Professor Lowery said he has that's also in the record from the testimony of Professor Carvalho is October 17th, Professor Carvalho says that Dean Burris tells him that he might not approve of Lowery's appointment in the future because of his speech. So that's in the record. And again, Dean Burris disputes the contour to that, but what matters is what Professor Carvalho communicated to Professor Lowery that he knows.

THE COURT: Well, isn't it those contours that plaintiffs have a right to explore in some limited discovery before the preliminary injunction hearing takes place to focus the efforts of that hearing?

MR. GLOVER: Well, certainly by exploring those contours through communications with other people, that sort of

information might show up, but -- and we don't know if it does, frankly, sitting here today. But what it isn't going to change and what it could not change is what Professor Lowery perceived at the time that he decided to self-chill and at the time that he perceived some sort of adverse employment event.

What we think he actually perceived at the relevant time was there was no need to self-chill. Why? Because the last threatened -- the last perceived threat was October 17th, and what happens? Two separate events that Professor Lowery speaks at. Can we go to slide -- actually, let me preface this.

So October 21st, Professor Lowery travels to the East Coast and speaks at a conference. He's at a panel, sitting in front of a microphone, clearly is speaking. Remember, this is after the last perceived threat. We then excerpted from the video that's in the record at 14-13. Behind the podium, you see there, McCombs School of Business. It's one of those vertical banners that can be raised up and easily traveled with. That is the logo for the Salem Center, and under that it says Salem Center. So Professor Lowery, as of October 21, is not only not self-censoring, he's traveling and speaking under the banner of the McCombs School and the Salem Center.

Now, slide 24 please, Tim. And he's not saying something different. He's communicating exactly what was being communicated in July of 2022. Would you play that for us

please, Tim?

(Audio recording playing.)

Speaker1: Again, they love these people because these people tell them optimistic stories. These people go to the football game with the President. These people are very good at one thing and one thing only which is convincing people that everything is actually not that bad and as long as I get enough resources, we'll do good. And every single time I have looked at so many of these attempts and I've been involved with them, the grifter always wins. And the grifter always wins, not because of the University, but because of the donors, the alumni, and the politicians, they'd always rather go with the grifter. And so that's why we're doomed.

(Audio recording stopped.)

* * *

MR. GLOVER: Slide four please. Your Honor, you heard some laughter at the end, it's obviously a room full of people. And the next slide you can see the backs of heads here. This is a room full of people he's speaking to, clearly has a microphone so that he can be heard.

You heard the grifter claim in October 21st. When else did he say grifter? In the July podcast where he's saying UT leadership got money from taxpayers and it's now being stolen by grifters. So he's saying the exact same thing that he was saying before he alleges he was self-chill, that's why

we were showing the Court the video that's already in the record.

Moving forward, he's not done on this speaking tour, Your Honor. He goes coast to coast, travels from the East Coast to Stanford and speaks on another panel. You can see him here communicating a message with a number of people. Professor Lowery will tell you, *Oh, well, I know I did that, I know I spoke to a room full of people and I know it's publicly available on the Internet* -- that's where we got it -- *but I wasn't talking about public universities, I was only talking about private universities.*

THE COURT: These documents, communications, e-mails, texts that plaintiff seeks, the deposition time the plaintiff would like to have, maybe it shows, maybe it doesn't, this plan to -- that University leadership is hatching, allegedly, right? Hatching to shut down critical speech about the University. And if both of y'all now have spent a decent amount of time talking about the merits or the facts underlying these claims, it doesn't seem to me, then, that the discovery side is totally irrelevant, is it? For the purpose of the preliminary injunction determination and assessing credibility of the witnesses?

MR. GLOVER: Well, two answers to that, Your Honor. First, the reason we're showing this and the reason that you saw it from Mr. Kolde as well is so you could see the

circumstances kind of surrounding what we're here to present to the Court and why these facts matter for determination of the instant motion. We're saying there's nothing needed for, whether it's you or Judge Ezra, when the preliminary injunction motion is decided, beyond what Professor Lowery perceived and what he did in response to his perceptions, and that's already in the record. What we could gain, and Your Honor keyed on it with Mr. Kolde in part of your discussion here, was maybe there was some plan to get Professor Lowery, maybe we need to learn about that. Despite the facts around the time of the events at issue that we say warrant denying this motion, there's direct testimony from the defendants about punishment, alleged punishment that is going to happen against Professor Lowery, and the answer is none. The first piece of evidence --

THE COURT: Well, of course, that's what the defendant is going to say. Right?

MR. GLOVER: Well, sure, Your Honor, but it's backed up by what? Objective evidence that he received a merit-based pay raise in September of 2022 in addition to reappointment to the Salem Center after saying these things that he says he was threatened about. And I think it's worth looking at this evidence because it wasn't mentioned by Mr. Kolde. Dean Mills, head of the business school, *I not had stopped to terminate, demote or discipline Dr. Lowery because of his speech. Dr. Lowery is a tenured professor.* Jay goes through what is

necessary to remove a tenured professor. On the fourth line down, she said, *Nobody has triggered this time-consuming process, nor is she aware of anything he has done or been accused of doing that would warrant his removal. His tenured position is secure. Regarding his speech more specifically, she has not censored discipline or otherwise punished Dr. Lowery for his speech and has no plans to do so in the future and she's not aware of any other University officials or administrators who have done so or plan to do so in the future.*

So what would be asked beyond this about what the plans are? And she's already said under oath that there is no plan to do that. Dean Burris didn't say much different. He's never threatened Dr. Lowery --

THE COURT: And I guess that goes to when I asked the question about a deposition on written questions and whether it's interrogatories or DWQ, that sort of testimony is not the same -- eliciting that sort of testimony isn't the same as having the witness in the hot seat squirming and giving the lawyer the opportunity to ask pointed questions and ask follow-up questions. Right? So shouldn't plaintiff have an opportunity to explore some of these statements a little bit before the preliminary injunction hearing?

MR. GLOVER: Your Honor, we would respectfully disagree that he needs that opportunity. The reason being is twofold. One, as we've said, nothing matters beyond what

Professor Lowery's perceptions were that he says caused him to self-chill, that he says caused him to perceive an adverse employment event. And then the indisputable evidence in the record that, one, he has not self-chilled, we saw at the end of the timeline from the plaintiffs that he stopped speaking all together. That's clearly not the case. And number two, there has been no adverse employment event such that there's a retaliation event. He received a merit-based pay raise shortly after the -- I think the key meeting that Mr. Kolde referred to was in August 12th. Well, within a month of that, he had a 7,500-dollar merit-based pay raise and reappointment to the Salem Center. So both the subjective perceptions of Professor Lowery which must be analyzed under an objective standard done by the Court as a matter of law, in addition to the indisputable evidence in the record so as that anything that we ask the defendants about this wouldn't change the Court's decision, in our view.

Your Honor, I would like to proceed where there was some mention of President Hartzell. And we think the Court is right, that -- first, there shouldn't be any discovery, of course, that's our view. But a third party such as President Hartzell or anyone else is certainly out of bounds here. And why is that? Because in the record, there's one -- excuse me, there's only one individual who allegedly had any kind of conversation with President Hartzell and that's a defendant in

the lawsuit, Professor Titman. But even in that conversation which is recanted from the testimony of Professor Lowery in a couple different declarations, Professor Titman tells Professor Lowery, *That in the same conversation that she already told Hartzell that nothing could be done about my speech.*

So that's what Professor Titman told Professor Lowery. Then after this conversation occurred is the merit-based pay raise, is the reappointment to the Salem Center. With that said a couple times, there's one other instance where Professor Hartzell is mentioned and that's in Professor Carvalho's declaration. It's along the same lines, so there's not much difference there.

There's no alleged direct conversation, to be crystal clear, between Professor Lowery and President Hartzell. And there's no direct allegation of a conversation between Professor Carvalho and President Hartzell. There's no allegation that Dean Mills spoke to President Hartzell directly about this or Dean Burris spoke to President Hartzell.

THE COURT: Maybe they haven't alleged it because they don't know because they haven't had a chance to explore those e-mails and text messages.

MR. GLOVER: The reason they might not know this, Your Honor, is because it's irrelevant to what he perceived that caused him to self-chill. If he didn't know it, if he didn't know that the President of the University and the dean of the

business school had some conversation or didn't, then that wouldn't weigh on his decision, his subjective decision to self-chill if he perceived some sort of adverse employment event. Instead, what we have is an inference from Professor Lowery. He says, *It is my inference based on what Sheridan has said to me during the summer and fall of 2022, that he did not want to keep getting pressure from Hartzell, Mills, Kothare or others to do something about his speech.*

THE COURT: How do you respond to plaintiff's argument in their reply that you haven't satisfied your burden of demonstrating that these requests -- referring specifically to the document requests -- are overly burdensome because they're to a set number of custodians, they're limited to five-month timeframe in a specific subject matter, that being directly or indirectly discussing speech? Do you have a sense of how many texts and/or e-mails that search would implicate?

MR. GLOVER: We don't, Your Honor, but we're certainly complying with our other discovery obligations under the Federal Rules.

THE COURT: Doesn't that undercut your argument that this is overly burdensome if you can't articulate how big of a body of work you're going to have to review that would be the burden? Or is it your argument they shouldn't get anything and, therefore, anything that we have to produce would be overly burdensome? I guess that's what I'm trying to

understand. Because it's something I got to consider is how burdensome is it for you to comply with this request?

MR. GLOVER: Your Honor, certainly the first point is the key point, that there's nothing necessary, so anything beyond what Professor Lowery knows is an undue burden at the preliminary injunction phase under the rules and the case law interpreting expedited discovery motions and requiring good cause. But second, as a practical matter, we don't have a set of discovery requests. We don't have a set of search terms for specific custodians. Even as of Monday, we spoke with Professor -- or excuse me, Mr. Kolde, and we appreciate him saying that the set of draft discovery that he sent a while back when he thought we were having a Rule 26(f) conference was a guide to what we were getting at, but even with that, we don't -- we're not able to go search for documents because we haven't been tendered a request that we said are the active requests that the Court must consider.

THE COURT: What is the status of your 26(f)? So you've not done it yet?

MR. GLOVER: That's right, Your Honor. We have not done that yet, Your Honor, under the authority in this Circuit that allows us to push back on that while we have pending threshold jurisdictional issues, and those being the ones that are fully briefed as of yesterday under Rule 12(b)(1).

THE COURT: Let's say that I disagree with you that --

about their entitlement to at least some discovery. How would you target their proposed requests? And I get they've not -- they've only filed this motion, but not actually tendered a discovery request to you. But how would you pare back, for example, the document requests as it's currently worded?

MR. GLOVER: Well, certainly Your Honor keyed in on it, the "or indirectly." Any defense lawyer has a hard time figuring out how to respond to a request for speech directly or indirectly, that's a difficult thing. I think the first issue that we would have is wondering if we go down this road and we try to see what directly implicates Professor Lowery's speech, then are we misinterpreting what a direct reference to Professor Lowery's speech is? And so do we need to revisit it as Mr. Kolde comes to us and says, Hey, we need this kind of document too, this kind of document too? And at that point, we're out of the expedited discovery in a preliminary injunction context and we're in full blown merits discovery getting ready for a trial on the merits and that's not what expedited discovery for a Rule 65 preliminary injunction motion allows to happen. That's why it's a high good cause standard for this discovery to occur, particularly when there are over 500 pages of evidence in the record and 29 pages of testimony from the plaintiff whose perceptions matter. That's what matters for the Court's determination and we say the record is complete as a result of that. I see my time is running up,

Your Honor, and I don't want to get busted here.

THE COURT: By my count you've got five minutes of your 30 remaining. Let me make sure I don't have other questions for you though.

What's your thoughts -- setting aside -- I get that you say no discovery is appropriate and I may agree with you, but for the sake of argument, let's say that I think some follow-up is merited or not completely out of the -- unreasonable. How would you -- what do you think about a deposition on written questions submitted to the -- maybe the three defendants limited to ten questions and subject to the same rules about compound questions that govern interrogatories? Because I can see that as a potential compromise that might not be totally satisfying, but at least is something. But also if I order that, I don't want the serving party to get cute and say, Okay, you're going to give me ten questions, well, I'm going to actually ask 30 and just kind of craft them into -- number them one through ten. What do you think about a deposition on written questions as a potential compromise on this?

MR. GLOVER: You mean to the defendants themselves, Your Honor?

THE COURT: Just to the defendants, not to any nonparties.

MR. GLOVER: I think that's certainly less burdensome.

I think that's a better option than requiring three very busy folks at the end of an academic year to sit for depositions. Certainly less burdensome. Of course, I say that without waiving our belief as to --

THE COURT: Understood.

MR. GLOVER: And I don't know whether Mr. Biggs and Mr. Hughes are burning holes in the back of my head at the moment, but I think that is certainly less of a burden than any of the other discovery that has been proposed today.

THE COURT: Because obviously, I mean, some of what they say, Hey, we should get a chance to explore this is -- you said this in your declaration, our person says something -- sees it differently and maybe that at least is sort of gives an opportunity for a follow-up question on some of it. And it may be that the response isn't any different than what they've already said, but at least in that respect they get -- the plaintiff does have an opportunity to ask a question as opposed to just having to take your word for it as it was chosen to be put into a declaration.

MR. GLOVER: On that point, Your Honor, if we are -- that's what just came to mind, if we are posed a question like that where one of our witnesses says I've already testified to that in that declaration, we don't want anyone to be upset when the answer is the same, because the facts are as they already said they are. If they perceived it one way -- if they

perceived a conversation in a certain way and that conflicts with Mr. Carvalho, they've already set that out in a declaration. So as long as we understand that we wouldn't be asked to change history and change our view of what happened, I think that would be more acceptable than sitting for a deposition.

THE COURT: Well, I mean, the witness is under oath, answer those questions truthfully.

MR. GLOVER: Sure.

THE COURT: Okay. I don't think I have any more questions for you right now. I think there's one other -- oh, sort of last question or request for alternative relief in your response was, well, what's good for the goose is good for the gander. If they get to depose us, we should get to depose them.

If what I order here is no additional document production, but a 10 DWQs to the three defendants, I assume you would want the opportunity to also submit a deposition on written questions on the same terms to plaintiff?

MR. GLOVER: Yes, Your Honor, we think it's only fair that if they get some discovery, that we get reciprocal, so that, as Mr. Kolde says, we get a more fulsome record.

THE COURT: Okay. Thank you, Mr. Glover. I set y'all 30 minutes a side, but I'm sure, Mr. Kolde, you have something you want to say in addition after having heard Mr. Glover's

argument. And so I've got a hard stop at 12:30. That's when I want to be stating my ruling on the record. And so you can kind of tell sometimes my questions don't always preview where my decision is heading, but that's sort of where I'm seeing this going is ordering DWQs limited to the parties in ten questions. So that's where I'm kind of leaning right now. I'll give you a few minutes to respond in whatever way you see fit.

MR. KOLDE: Thank you, Your Honor. I'll try to keep it brief. One of their themes is clearly that only Lowery's subjective perceptions matter. But I would say why do they keep focusing on the fact that we didn't threaten Lowery. Their argument really is distilled down to We didn't threaten Lowery and even if we did, we're allowed to threaten him.

So whether the threats occurred and whether there's corroborating evidence threats occurred is important in this case. I would note without going into detail --

THE COURT: Let's talk a little bit about that, right? The purpose of this, this preliminary injunction is just going to be directed at the allegedly chilling behavior. Right? And so it seems they've got a pretty good point. Right? He can't -- if you're self-censoring, that's something you're doing in real time based on the knowledge you have in your brain at that moment, your subjective awareness. And everything Professor Lowery knows about what he was thinking is

in his possession. Right? And then that subjective -- the reasonableness of that subjective belief of a need to self-sensor, right, is engaged against the objective reasonableness of the reaction, his perception of reality. So I take it, then, is the discovery that you want to sort of set up your argument at an evidentiary hearing, should one take place, it's, I guess, to further prove the objective reasonableness?

MR. KOLDE: Absolutely, Your Honor.

THE COURT: But objective reasonableness isn't necessarily a factual issue, is it?

MR. KOLDE: I do actually think that it's a component of valuating the subjective belief in the censorship, whether it's a reasonable decision to censor. In looking at their argument as a whole, they are arguing that we didn't threaten him and, therefore, his belief that he feels threatened is unreasonable. That's part of their argument, so I really -- I have to take issue with this argument, them saying it doesn't matter. Of course it matters. That's why they keep saying we didn't threaten him. And that's why they haven't told us anything about Jay Hartzell's role because probably they don't have good things to say about Jay Hartzell's role.

Couple of other things that really kind of rub me the wrong way, Your Honor, I want to just take a moment to address them, this idea that somehow Jay Hartzell is a third party.

This is an official capacity suit only. We have not made a damages claim. Official capacity suits, as the Court knows, are under Ex parte Young, they are a way of suing the state agency, okay. The University of Texas is functionally a defendant in this lawsuit. That's why legal counsel's office is in the courtroom today representing the University of Texas, of which Jay Hartzell is the President. So this notion that he is not somehow involved in this suit or the entity that he's a part of, that he sits atop of as the chief executive is not part of this suit I think is a fiction and not accurate.

THE COURT: Well, again, but in terms of the limited task that Judge Howell is deciding today, right, for the purposes of the preliminary injunction, I mean, what you're talking about is kind of a fight for another day, right? Whether he might have to sit for a deposition once this case proceeds to the merits and whether or not you're entitled to a permanent injunction, right?

MR. KOLDE: Well, yeah, we'd like the deposition now even if it's on written questions because he may use various ways and go-betweens to get his message to the people. This is how you deliver threats, all right? This is how the mafia does it. This is how it happens in the corporate world too and this is how it happens in government. I say that as an ex-government lawyer, I spent a lot of time defending these cases. You always protect the king and you send intermediaries

to deliver the messages that you don't want the king to be directly implicated in. That's why we want to talk to Jay Hartzell because that is the most efficient way of finding out whether he was bothered by this and what he did about it.

I'm taking issue with the notion that characterized him as a third party. He is not a third party. UT is part of this lawsuit. I also am, frankly, a little bit offended by this position taken by the defense counsel that they don't need to do anything to search their own records or that it's my job to give them search terms. One of the primary Sedona principles is that defendants and producing parties are in the best position to know what documents they have and how to go about searching them. This ingénue routine of, Oh, we don't know, we don't know what they mean, they could do a search on the search terms and get a search term report in about 20 minutes if they wanted to do it. And they should have come to court, they should have told me about them if they really are about burdensomeness. They've shown us zero about burdensomeness. They could have easily talked to Jay Hartzell or any of the other five witnesses that we asked them -- asked about and said, Did you send any text messages about Lowery or his speech during that time period or do you think you might have sent those? Do you think you might still have those? Five-minute conversation with each of those people potentially. They would at least know what's out there to be gathered. How

many do you think it might be? Do you still have them. Those sort of thing. They've done nothing to show that.

I've been on the defending side. If you are going to oppose discovery, you have some duty to come forward and show that it's burdensome. They have all the information. I don't have the information. I've asked for it in a targeted manner in accordance with the Sedona principles. I've gotten zero information from the other side except that We don't want to give it to you.

And the reason they don't want to give it to us is because they don't want that information in the record. So those are the main things that I'm concerned about, Your Honor. You did ask me about the T.S. Burke and the Stevens, the Big Springs cases. It's true those were not expedited discovery cases. We say nevertheless the principles at issue there are relevant.

You know, I understand this case may go into full blown discovery at some point. We don't know. And as this Court knows, either side could appeal the granting or denial of the preliminary injunction. This case may go to the Fifth Circuit. I think it presents very important issues about free speech law, civil rights, potentially the future of retaliation doctrine in the Fifth Circuit regarding First Amendment speech and we would like the record to be as complete as possible so that that issue could be presented to the Fifth Circuit, you

know, in a wholesome manner. We don't think the discovery we're asking for is actually that much work. And while I can't say that with certainty, look at how much effort and lawyer resources they have expended resisting this motion. They could have probably produced this discovery to us or at least had some of these depositions done if it was the same amount of effort and expenditure of resources involved. So we'd ask the Court to please keep that in mind.

THE COURT: Well, I shouldn't begrudge a defendant who has a good faith reason to assert a challenge to the jurisdiction of the Court to grant any of the relief that's being sought by the plaintiff in the first place from resisting discovery requests, should I?

MR. KOLDE: They have a due process right, of course, and a right for counsel to resist, but I think it's very telling of what are they hiding? If they don't have anything to hide, Your Honor -- I say this again as a former government attorney -- it's easier to just put your cards on the table then if you don't have something to hide because you can just say I've got nothing to hide and go into court based on that evidence. Of course, I didn't get paid by the hour either, so I may not have had an incentive to engage in discovery battles, but again, what's missing here and what they are fighting about and trying to prevent us from getting at, to me is telling. That is my argument to the Court. They are hiding something.

THE COURT: Let's be careful about casting aspersions on counsel. I think intimating or insinuating that they have a financial incentive to be difficult to discovery just to inflate their hours I think is unfair.

MR. KOLDE: I did not say that, Your Honor. The financial incentive is there, it's very real. That's true and I think that's an unfortunate thing about our legal practice. I haven't been paid by the hour in a long time, so I've certainly seen that issue from the other side. I don't know that that's what's going on here. And I think counsel on the other side is very capable and they know what they're doing, but I think the fact that they're fighting so hard about this does tell the Court, tells us something about what's going on here.

They are placing their resources this way for a reason. Because I would argue not to inflate the bills because they don't want us to get at those resources. They may be worth every single penny of what they're expending here because they don't want us to get at that evidence. That's my argument to the Court. Thank you, Your Honor.

THE COURT: Thank you, Mr. Kolde. Any last words from you, Mr. Glover?

MR. GLOVER: Just briefly, Your Honor, again, I remind the Court that as to President Hartzell, there's only one instance in which a conversation with President Hartzell is

referenced in the record and that was communicated to Professor Lowery and we certainly knew at the time. He's not a defendant in the lawsuit. We talked about University is hiding something, I feel like -- it's important to say not just cast aspersions on defense counsel, including me, Mr. Dow, and others who couldn't be here, but the University of Texas is a public institution, so we need to be careful that we're not saying that a public entity in the State of Texas is hiding something. That's certainly not the case. How do we know that? Three defendants filed declarations, sworn testimony in response to the preliminary injunction motion. There is certainly no hiding from this public entity. That hasn't happened.

The complaint is that we haven't searched our records and we don't know what the -- what is out there. The instruction we've been given in the preliminary injunction context is figure out what I'm asking you and go find it. And that's not an actionable discovery request and that's why we haven't done any targeted discovery search. So that's why we are where we are, Your Honor.

THE COURT: Thank you.

MR. GLOVER: Thank you.

THE COURT: I am prepared to rule on this from the bench and I'll issue a written order memorializing this decision, and I might seek your input on exactly how to phrase

it in an effort to avoid future dispute regarding what I meant in my order, but I've also learned I can't just get wrapped around the axle trying to stop people from fighting with each other over things. And so we'll do our best to craft a clear order. And so I agree that the -- well, as I said at the outset, I see the scope of what's at issue in discovery, if any of it's appropriate in this case, is limited because the scope of what might be considered at a preliminary injunction hearing is limited as is the relief that would be awarded. And that I agree with defendants that we do have an exceptionally well developed record going into that hearing.

However, I understand plaintiff's concerns and desire to try to suss out some of these disputed facts in advance of the hearing in an effort to build their case, build the case to prove their entitlement to a preliminary injunction and that something more than what currently exists, what can be appropriate and not overly burdensome.

As for the document requests, I do find the requests for the e-mails and texts directly or indirectly related to Professor Lowery's speech, I do find how that request is phrased in the proposed relief to be unwieldy and while I've given some thought to how I might narrow that, I'm not going to engage in that process for you, and so I'm going to deny the request for production of e-mails and texts.

As for the request for depositions, as I mentioned, I

think a deposition on written questions is a reasonable way to give the plaintiffs to further explore some of these disputed issues in the parties' declarations, and so what I intend to order is that defendants and plaintiff, if defendants choose to serve them, respond to 10 DWQ questions. And I think I can leave it up to the parties seeking discovery to decide to serve those whenever they choose and that the more important deadline is by when must the respondent respond. So I'm open to a suggestion on that. Maybe a week is enough time or maybe two weeks once the DWQ is served on the other side. Is there any comment from the parties on that?

MR. GLOVER: Your Honor, we think two weeks is a reasonable response then.

THE COURT: Do you think that's enough time, Mr. Kolde.

MR. KOLDE: Well, I mean, shorter is better. We can maybe compromise on ten days or something like that.

THE COURT: We'll say ten days, not including -- well, if that ten day deadline falls on a weekend or a holiday, but otherwise, ten days response time.

Anything else? Any further clarity needed on that, on the order in general?

MR. KOLDE: So just to understand the Court's order, Your Honor, we get ten questions per defendant for a deposition on written questions and no other witnesses, is that correct?

THE COURT: Yes, I'm sorry, I did not say that, although I kind of talked about it earlier in the hearing, but yes, per defendant.

MR. KOLDE: Okay. Thank you, Your Honor.

THE COURT: And that's per defendant as of today. There are three defendants, Mills -- I think we have Burris, Mills and Titman. Those are the three defendants who are subject to this. And then, of course, Professor Lowery, who is also a party is subject to responding to the same thing from the defendant, 10 DWQ questions. Any further clarity or any other questions?

MR. KOLDE: Your Honor, I understand that -- and I understand the Court's order. Is there in the Court's role as the go-to contact for discovery issues, is there any instruction from the Court about the parties having their 26(f) conference. By my calculations, latest date it would have to occur by would be before the May 1st deadline to file a report with the Court. So we're still about three and a half weeks away from that. We've been asking to schedule the 26(f) conference for a number of weeks and the last time we tried to hold it, they said, *Oh, we're not having the 26(f) conference.* So we're trying to have it and we haven't made progress on that.

THE COURT: Well, if it's required by the Rules, I guess you've got to seek relief from the Court to not meet

whatever deadline there is for the conference. Right? Is that saved and sought.

MR. GLOVER: No, we haven't sought relief from the Rule 26(f) conference. And if we're going to do that, Your Honor, that's certainly something that we can work out. And if we're otherwise governed by the Rules, then it's for the lawyers to work out, we think, when that Rule 26(f) conference would occur.

THE COURT: I don't intend to provide any more guidance on that than what's provided by the rules. Anything else while we're all here together?

MR. GLOVER: Nothing from the defendants, Your Honor.

MR. KOLDE: Nothing, Your Honor. Thank you.

THE COURT: You're excused. Thank you.

COURT SECURITY OFFICER: All rise.

(12:30 p.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: May 8, 2023

/s/ Angela M. Hailey

United States Court Reporter
262 West Nueva Street
San Antonio, Texas 78207
(210)244-5048